184

No. 10-727

Supreme Court, U.S.
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In The Supreme Court of the United States

WILLIAM IREY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY TO BRIEF OF UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Reasons for Granting the Writ 1

I.

In reversing a below-guideline sentence as substantively unreasonable and ordering the district court to impose a 30-year guideline sentence on remand, the Eleventh Circuit effectively applied *de novo* review, in conflict with the "deferential standard of review" adopted by this Court and applied by other circuit courts 1

A. The Eleventh Circuit effectively applied a *de novo* standard of review instead of the requisite deferential abuse of discretion standard adopted by this Court. 2

B. The Eleventh Circuit misapplied "closer review" to the district court's consideration of mitigating factors. 7

C. Mandating a particular sentence on remand is in direct conflict with this Court's decisions in *Gall* and *Pepper*, and in many cases would violate the Sixth Amendment. 10

TABLE OF CONTENTS – continued

II.

The Eleventh Circuit exceeded its authority by delaying the issuance of the mandate without providing the parties with notice of its intention to do so and abused its discretion by failing to take any action for more than four months after the court issued its original panel decision. 13

Conclusion 15

TABLE OF AUTHORITIES

CASES **Page(s)**

Gall v. United States, 552 U.S. 38 (2007) . . . *passim*

Kimbrough v. United States, 552 U.S. 85 (2007) 4,7-9

Pepper v. United States, 131 S. Ct. 1229 (2011) 8-12

Spears v. United States, 129 S. Ct. 840 (2009) . . . 8

United States v. Cavera, 550 F.3d 180 (2d Cir. 2008) (*en banc*) 5

United States v. Dean, 2011 WL 902102 (11th Cir., Mar. 16, 2011) 10

United States v. Gardelli, 545 F.3d 1089 (D.C. Cir. 2008) 5

United States v. Smart, 518 F.3d 800 (10th Cir. 2008) 3,4-5

CONSTITUTIONAL PROVISION

U.S. Const. amend. VI 10, 12

TABLE OF AUTHORITIES – continued

STATUTES	Page(s)
18 U.S.C. § 3553	*passim*
18 U.S.C. § 3742	12
RULE	
Fed.R.App.P. 41	14
INTERNET WEBSITES	
http://www.ca1.uscourts.gov	13
http://www.ca2.uscourts.gov	14
http://www.ca3.uscourts.gov	14
http://www.ca4.uscourts.gov	14
http://www.ca6.uscourts.gov	14
http://www.ca7.uscourts.gov	14
http://www.ca8.uscourts.gov	14
http://www.ca9.uscourts.gov	14
http://www.ca10.uscourts.gov	14
http://www.cadc.uscourts.gov	14

REASONS FOR GRANTING THE WRIT

I.

In reversing a below-guideline sentence as substantively unreasonable and ordering the district court to impose a 30-year guideline sentence on remand, the Eleventh Circuit effectively applied *de novo* review, in conflict with the "deferential standard of review" adopted by this Court and applied by other circuit courts.

The Eleventh Circuit concluded that the substantial mitigating evidence Mr. Irey presented at sentencing could not reasonably justify a sentence of even one day less than the maximum permissible guideline sentence of 30 years' imprisonment. Pet.App.135-36. To reach this conclusion, the *en banc* court applied what "amounts to *de novo* review" of the district court's consideration and weighing of the 18 U.S.C. § 3553(a) factors "in the guise of abuse of discretion." Pet.App.220 (Tjoflat, J., concurring and dissenting). Contrary to the arguments set forth in the Brief of the United States in Opposition ("BIO"), the Eleventh Circuit's standard of review violates *Gall v. United States*, 552 U.S. 38 (2007), and conflicts with other circuits' post-*Gall* review of sentences.

A. **The Eleventh Circuit effectively applied a *de novo* standard of review instead of the requisite deferential abuse of discretion standard adopted by this Court.**

The government argues that the Eleventh Circuit applied *Gall*'s deferential abuse-of-discretion standard because the court "recognized" that standard. BIO 13 (citing Pet.App.46). That argument must meet the same fate as it did in *Gall*. *See* 552 U.S. at 56 (reversing Eighth Circuit's decision that "correctly stated the appropriate standard of review was abuse of discretion, [but] engaged in an analysis that more closely resembled *de novo* review"). Like the Eighth Circuit in *Gall*, the Eleventh Circuit failed to demonstrate the required level of deference when it conflated the roles of the district and appellate courts by conducting its own detailed review of the record and the § 3553(a) factors, independently finding new facts, reweighing the § 3553(a) factors, and independently assessing whether there were sufficiently "compelling" justifications to support a variance. *See* Pet. 9-10,21; Pet.App.50,55-57,72,84-86,88,91-93,103-04,111-18,121-23,129,130. Tellingly, the Eleventh Circuit created its standard of review from a number of unrelated contexts, including the standard improperly used by the Eighth Circuit in *Gall*, in order to engage in the review it applied here. *See* Pet. 15-27.

The government next attempts to defend the Eleventh Circuit's analysis by asserting that "*Gall* did

not prohibit an appellate court from reviewing the district court's balancing" of the § 3553(a) factors. BIO 14. The government's argument is incorrect, and it misses the point. The Eleventh Circuit did not simply review the district court's "balancing" of the statutory factors; it weighed those factors anew, much like the Eighth Circuit did in *Gall*.

In *Gall*, this Court observed that the Eighth Circuit had found that the district court "gave too much weight" to certain facts, "gave significant weight to an improper factor," and improperly weighed certain factors. *See* 552 U.S. at 45, 56-57. This Court reversed, stating that the Eighth Circuit "should have given due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence." *Id.* at 59-60. Likewise, the Eleventh Circuit's rigorous review of the sentence imposed in this case does not afford the district court the deference it is due.

The Eleventh Circuit's misapplication of *Gall* is further evident when its *en banc* decision is compared to other circuit decisions that properly apply *Gall*. Contrary to the government's argument, BIO 14-15, this comparison also demonstrates a circuit conflict. For example, before *Gall*, the Tenth Circuit effectively applied the same analysis as the Eleventh Circuit did here. *Compare United States v. Smart*, 518 F.3d 800, 806 (10th Cir. 2008) (explaining its pre-*Gall* reasonableness review), *with United States v. Irey*, No.

08-10997 (11th Cir. 2010) (*en banc*) (Pet.App.1-136) (applying an analysis not materially different from the Tenth Circuit's pre-*Gall* review).

After *Gall*, the Tenth Circuit concluded that this "rigorous form of review" cannot be reconciled with and was "substantially invalidate[d]" by *Gall* and *Kimbrough v. United States*, 552 U.S. 85 (2007). *Smart*, 518 F.3d at 802. The appellate court thus recognized that its "own reading of the factual record, in place of the district court's reading, ignores the trial judge's 'superior position to find facts and judge their import under § 3553(a) in the individual case.'" *Id.* at 807 (quoting *Gall*, 552 U.S. at 51). To afford "both formal and practical deference to the sentencing court's assessment of the facts under § 3553(a)," the Tenth Circuit explained, an appellate court may not simply "credit" the sentencing court's "raw findings of individual fact" while examining *de novo* "the weight a district court assigns to various § 3553(a) factors, and its ultimate assessment of the balance between them[.]" *Id.* at 807-08. Recognizing *Gall*'s important distinction between the roles of the district and appellate courts, the Tenth Circuit stated that "an appellate court's 'disagree[ment] with the District Judge's conclusion that consideration of the § 3553(a) factors justified . . . a marked deviation from the Guidelines range' is simply not enough to support a holding that the district court abused its discretion." *Id.* at 808. Rather, the appellate court must defer to "a district court's factual findings" as well as "its

determinations of the weight to be afforded to such findings." *Id.*; *see also United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (*en banc*) (stating that appellate courts "do not consider what weight we would ourselves have given a particular factor. . . . Rather, we consider whether the factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case"); *United States v. Gardelli*, 545 F.3d 1089, 1090, 1093-94 & nn.4-5 (D.C. Cir. 2008) (affirming a below-guideline sentence under "narrow and deferential" substantive appellate review, and citing cases from other circuits applying this review; rejecting "Guidelines-centric appellate approaches," such as requiring extraordinary circumstances to justify sentences outside the guidelines; observing that *Gall* assigned district courts – not appellate courts – the role of ensuring that the justification for a variance "is sufficiently compelling to support the degree of the variance").

Unlike the circuits that correctly apply *Gall*, the Eleventh Circuit has failed to integrate *Gall*'s teachings into its practice. Rather than deferring to the district court's determinations of the weight to be afforded to its factual findings, the Eleventh Circuit usurped the district court's role by weighing the facts and § 3553(a) factors anew. *See* Pet.App.214-19 (Tjoflat, J., concurring and dissenting) (pointing out that the majority's conclusion – that the weight of facts

under § 3553(a) presents a question of law – conflicts with this Court's precedent and at least one circuit).

The government tries to deflect the Eleventh Circuit's overreaching by noting that, despite its conclusions that some of the district court's findings of fact were clearly erroneous, the Eleventh Circuit ultimately *said* it would nevertheless assume the district court's findings were correct because the government did not contest those findings. BIO 18-19. As Judge Tjoflat observed, however, it makes little sense for the *en banc* majority to consider new evidence and arguments if it actually accepted the district court's findings. Instead, the *en banc* majority's consideration of new evidence and its harsh criticism of the district court's findings indicate that it rejected them, and that its rejection of them played an important role in its analysis and improperly contributed to its ultimate decision to reverse Mr. Irey's sentence. Pet.App.223-24 n.93 (Tjoflat, J., concurring and dissenting).

The government has thus provided no legitimate justification for the Eleventh Circuit's rigorous form of review. Since that form of review violates *Gall* and conflicts with other circuits, certiorari review is warranted.

B. The Eleventh Circuit misapplied "closer review" to the district court's consideration of mitigating factors.

The government argues that the Eleventh Circuit's application of a heightened standard of review – "closer review" – to the district court's consideration of mitigating factors does not warrant review by this Court because the Eleventh Circuit's application of "closer review" below is merely "case-specific." BIO 17. The government is incorrect.

In *Kimbrough*, this Court stated in *dictum* that "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." 552 U.S. at 109. Here, however, the district court plainly did not base the sentence imposed on its "view" of the policy merits of the applicable guideline or on a categorical disagreement with the applicable guideline. Rather, it considered mitigating factors relevant to Mr. Irey as a person (his mental disorder, successful participation in treatment, low risk of recidivism with treatment, and history as a good husband, father, and contributor to the community), which it was required to consider under § 3553(a)(1) and which are relevant to the purposes of sentencing under § 3553(a)(2). This Court has never suggested that its "closer review" *dictum* might apply when a district court did *not* express a "view" on the

guideline's policy merits. Moreover, "masking . . . categorical policy disagreements as 'individualized determinations' . . . is institutionalized subterfuge" and not "an acceptable sentencing practice." *Spears v. United States*, 129 S. Ct. 840, 844 (2009). The Eleventh Circuit incorrectly assumed that the district court engaged in an unacceptable sentencing practice in order to give itself license to apply a stricter standard of review than this Court's holdings allow and to apply this Court's *dictum* in a situation in which this Court has never suggested it could possibly apply.[1]

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[1] The government also contends that Mr. Irey "does not dispute that more searching appellate review might be appropriate for variances based on policy disagreements with the guidelines. BIO 17. This contention is irrelevant since the district court did not base its variance on a policy disagreement with the guidelines. In any event, Mr. Irey does not concede that closer review might be appropriate whenever a district court varies from the guideline range based on a policy disagreement. *See* Pet. 32 (emphasizing that "the Court has never held that closer review is required in any case"). This Court has made clear that a variance based on a disagreement with a guideline that does "not exemplify the Commission's exercise of its characteristic institutional role" is entitled to the same respect on appeal as any other variance. *See Kimbrough*, 552 U.S. at 109 ("crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role"); *Spears*, 129 S. Ct. at 843 ("*Kimbrough* thus holds that with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect."). And in *Pepper v. United States*, 131 S. Ct. 1229, 1247 (2011), the Court reiterated, without mentioning, much

If the government is correct that the Eleventh Circuit's use of "closer review" in these circumstances implicates no legal issue warranting review by this Court, then virtually *every* downward variance based on a mitigating offender characteristic or offense circumstance could be subjected to stricter scrutiny by appellate courts on the theory that it represents a disagreement with the applicable guideline range. This is because most mitigating factors are omitted from the guidelines themselves and are discouraged or prohibited by policy statements as grounds for departure. *See* Pet. 28-30. To transform downward variances based on individualized mitigating factors into "policy disagreements" with the guidelines and subject them to "closer review," as the Eleventh Circuit did, would effectively require that "the Guidelines *must* be followed even where the district court's application of the § 3553(a) factors is entirely reasonable" – a requirement patently inconsistent with this Court's decisions. *See Kimbrough*, 552 U.S. at 113-14 (Scalia, J., concurring).

Additionally, the government's contention that this issue does not warrant further review because it is case-specific is undermined by the Eleventh Circuit's recent decision in *United States v. Dean*, 2011 WL

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less endorsing, "closer review," that "a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views . . . particularly . . . where . . . the Commission's views rest on wholly unconvincing policy rationales."

902102 (11th Cir. Mar. 16, 2011). There, the district court did *not* vary from the guideline range. Just as in *Irey*, therefore, this Court's *dictum* regarding "closer review" could not possibly apply. Yet, *Dean* relied on *Irey*'s discussion and application of "closer review" to hold that the within-guideline sentence was reasonable. The Eleventh Circuit thus applied *Irey*'s substantive conclusions regarding the soundness of the applicable guideline – reached there only through improperly exercised "closer review" – in another case in which "closer review" cannot possibly apply.[2] Mr. Irey requests that this Court grant certiorari to make clear that the Eleventh Circuit is wrong to apply "closer review" in these situations.

C. Mandating a particular sentence on remand is in direct conflict with this Court's decisions in *Gall* and *Pepper*, and in many cases would violate the Sixth Amendment.

The remedy the Eleventh Circuit chose further illustrates the overreaching new law the court created. The Eleventh Circuit effectively resentenced Mr. Irey by mandating that, on remand, the district court impose a 30-year guideline sentence, *and nothing less*. Therefore, the Eleventh Circuit violated *Gall* and *Pepper* both by improperly substituting its own judgment for that of the district court, whose

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[2] The Eleventh Circuit has now cited *Irey* at least 48 times, further indicating the need for certiorari review to halt the Eleventh Circuit's use of its improper standard of review.

overarching duty is always to impose a sentence "sufficient, but not greater than necessary" for *this particular offender*, and by entering a remand order that improperly prohibits the district court from considering evidence critical to its overarching duty on remand.[3] *See Pepper*, 131 S. Ct. at 1239-40 ("[T]he punishment should fit the offender, not merely the crime."); *id.* at 1242 (expressly recognizing the relationship between a mitigating factor (post-sentencing rehabilitation) and the district court's statutory duty to impose a sentence that is *not greater than necessary* to serve § 3553(a)(2)'s sentencing purposes, both at the original sentencing and on remand); *Gall*, 552 U.S. at 51-52 (making clear that the decision regarding the appropriate sentence under § 3553(a) should be made by the district court, not the appellate court, because the district court is in a "superior position to find facts and judge their import under § 3553(a) in the individual case").

Moreover, since the advisory guideline range is often based on contested judicial factfindings, the remedy employed by the Eleventh Circuit – remand for imposition of a guideline sentence – would violate

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[3] *See* Pet.App.73-74 & n.22 ("emphatically" disagreeing with the "'parsimony principle' terminology and the concept that underlies it," because it ignores the requirement that the sentencing court "be generous enough to avoid [a sentence] that is too short" and stating that a "more accurate term, if one is needed, might be 'the Goldilocks principle,' because the goal is to lock in a sentence that is not too short and not too long, but just right to serve the purposes of § 3553(a)").

defendants' Sixth Amendment rights in many cases where the contested facts were not found by a jury or admitted by the defendant. The government unsuccessfully attempts to downplay the Sixth Amendment implications of the Eleventh Circuit's extraordinary remedy by arguing that the unique facts of this case support that remedy and that Mr. Irey is not asserting a Sixth Amendment violation in this case. But no facts, no matter how unique, justify an appellate court disregarding this Court's holdings.

Furthermore, *Pepper* demonstrates that this Court is concerned with the "potential" for future violations of the Sixth Amendment. 131 S. Ct. at 1244 (invalidating 18 U.S.C. § 3742(g)(2) because of the "possibility" that its application would result in a Sixth Amendment violation in some cases). In light of the need to avoid Sixth Amendment violations in all cases, the government's case-specific arguments against granting certiorari review should be rejected.

II.

The Eleventh Circuit exceeded its authority by delaying the issuance of the mandate without providing the parties with notice of its intention to do so and abused its discretion by failing to take any action for more than four months after the court issued its original panel decision.

The government contends that this issue does not warrant certiorari review because it is case-specific and the Eleventh Circuit has since amended its rules to require a docket entry alerting the parties that the mandate has been withheld. BIO 20-23. The government's argument is incorrect.

First, the Eleventh Circuit amended its rules on August 1, 2010, two days after rendering its *en banc* decision. Pet.App. 324-25. The timing of that amendment provides a strong indication that the Eleventh Circuit recognized that the procedure it employed in Mr. Irey's case was improper.

Second, the fact that the Eleventh Circuit has amended its rules to require a docket entry does not establish that this issue will not reoccur in other circuits. A review of the other circuit courts' local rules and internal operating procedures indicates that the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits do not have a similar rule. *See* http://www.ca1.uscourts.gov;

http://www.ca2.uscourts.gov;
http://www.ca3.uscourts.gov;
http://www.ca4.uscourts.gov;
http://www.ca6.uscourts.gov;
http://www.ca7.uscourts.gov;
http://www.ca8.uscourts.gov;
http://www.ca9.uscourts.gov;
http://www.ca10.uscourts.gov;
http://www.cadc.uscourts.gov.

Accordingly, the extent of a circuit court's authority under Rule 41 remains an important federal question worthy of further review.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, Mr. Irey respectfully requests that this Honorable Court grant certiorari review.

Respectfully submitted,

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